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IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "tension" between the decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which the Court acknowledged in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 75-77 (1998), should be resolved by holding that unions have authority under the Railway Labor Act to negotiate collective bargaining agreements that provide for arbitration of statutory employment-discrimination claims.

2. Whether, even if unions lack authority to negotiate collective agreements providing for arbitration of statutory claims, the Railway Labor Act obligates an employer, before requesting individual *Gilmer*-type arbitration agreements from union-represented employees, to bargain with the union concerning such matters as whether the individual arbitration agreements will be voluntary or required by the employer as a condition of hire or retention, and what the specific terms and conditions of the agreements will be.

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
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NORTHWEST AIRLINES, INC.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Air Line Pilots Association, International (ALPA) respectfully petitions the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 199 F.3d 477, and is reprinted in the Appendix (App.) at page 1a. The opinion of the district court is not officially reported, and is reprinted at App. 20a.

JURISDICTION

The appeal in this case was initially heard by a panel of the court of appeals, which issued its decision on December 28, 1999. ALPA then filed a timely petition for rehearing *en*

banc, and on March 9, 2000, the full court of appeals granted that petition, vacated the panel's decision, and ordered rehearing *en banc*. (App. 42a). On May 19, 2000, after oral argument, the full court entered a judgment reinstating the earlier panel opinion "as the judgment and opinion of the court sitting *en banc*." (App. 44a). This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act are reprinted in the Appendix at pages 46a-49a.

STATEMENT OF THE CASE

Petitioner ALPA is a labor organization that represents the pilots employed by most U.S. commercial air carriers, including respondent Northwest Airlines, Inc. (Northwest). ALPA brought this action in the United States District Court for the District of Columbia to obtain an injunction against Northwest's practice of requiring its pilots, at the time of hire, to sign individual employment contracts, called "Conditions of Employment" (COE), which remain in effect during the pilots' entire tenure of employment. ALPA claimed that the COEs dealt with matters relating to the pilots' "rates of pay, rules, and working conditions" concerning which Northwest has a statutory duty to bargain with ALPA as the pilots' exclusive bargaining representative. *See* Railway Labor Act § 2 First & Second, 45 U.S.C. § 152 First & Second. Therefore, ALPA contended, it was unlawful for Northwest to enter into or maintain these individual agreements with pilots represented by ALPA without ALPA's prior consent. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1337(a).

As one of its defenses to the action, Northwest contended that ALPA had tacitly agreed to the versions of the COE that

had been executed prior to 1995 by not objecting to them earlier. The district court determined that this contention had sufficient basis to raise a "minor dispute" (i.e., a contractual issue) that, under the Railway Labor Act, could only be resolved through arbitration before a system board of adjustment. (App. 31a-35a). ALPA did not challenge this holding on appeal.

The remainder of the litigation focused on the version of the COE that Northwest had begun to use in 1995. That agreement included, for the first time, an arbitration provision[1] which required the signatory pilot to submit to binding arbitration "any claims or disputes I may have with respect to my employment with the company."[2] This provision specifically covered statutory "discrimination claims" under "any state or federal law prohibiting discrimination."

Northwest defended its right to enter into these individual arbitration agreements without prior bargaining with ALPA on the basis of this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). It argued that *Gardner-Denver* precludes a union from agreeing to binding arbitration of individual employees' statutory discrimination claims, and therefore removes this subject from the scope of collective bargaining under the Railway Labor Act.

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[1] In addition to the arbitration clause there were four other new or revised provisions in the 1995 COE that ALPA challenged below, but while the litigation was pending Northwest eliminated three of these provisions and revised the fourth to conform with the parties' collective bargaining agreement. (App. 5a-6a, 17a). The court of appeals concluded that these changes made "ALPA's claim for injunctive relief unripe" with respect to these four provisions. (App. 18a). ALPA does not seek review of this portion of the decision below.

[2] While the lawsuit was pending Northwest revised the arbitration clause to make clear that it did not apply to any disputes arising under the collective bargaining agreement between the Company and ALPA.

On cross-motions for summary judgment, the district court rejected Northwest's contention. It held that, "regardless of whether [ALPA] can itself enter into arbitration agreements on behalf of its members, Northwest is nevertheless required, under § 2 Seventh of RLA, 45 U.S.C. § 152, to obtain the union's consent before it can execute individual contracts affecting the 'rates of pay, rules, or working conditions' of represented employees." (App. 30a). Accordingly, the court enjoined Northwest "from implementing the COEs containing the arbitration provision and from requiring from newly-hired pilots COEs containing the arbitration provision pending completion of the bargaining and mediation process required by RLA §§ 5 and 6, 45 U.S.C. §§ 155 and 156." (App. 37a).

The court of appeals reversed, accepting Northwest's argument that *Alexander v. Gardner-Denver* prohibits a union from agreeing to binding arbitration of statutory claims, and therefore removes this subject from the scope of collective bargaining. In a panel opinion that was later adopted by the full court sitting *en banc*, the court began its analysis by rejecting the idea that *Gardner-Denver* had been superseded by the Court's later decision in *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991). It acknowledged that *Gilmer*, by allowing enforcement of an *individual* agreement to arbitrate a statutory discrimination claim, had retreated from the principle announced in *Gardner-Denver* that "there can be no prospective waiver of an employee's rights under Title VII." The court also acknowledged that *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998) had recognized the existence of an unresolved question as to "'whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employee's federal forum rights survives *Gilmer*.'" (App. 12a).

But the court ultimately concluded that *Gardner-Denver* still stood as a bar to any union-negotiated agreement providing for arbitration of statutory discrimination claims:

> Whatever the Supreme Court said—or, more precisely, refrained from saying—in *Wright*, we do not understand the Court in *Gilmer* to have overruled *Gardner-Denver*. Rather, the Court expressly distinguished that case, which strongly implies that it remains the law within its field of application. We therefore leave to the Court itself the prerogative of overruling its own precedent (if it will); we apply the law as it stands.
>
> We see a clear rule of law emerging from *Gardner-Denver* and *Gilmer*: Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him. All of the circuits to have considered the meaning of *Gardner-Denver* after *Gilmer*, other than the Fourth, are in accord with this view.

(App. 12a-13a) (citations omitted).

The court of appeals next considered the district court's view that, even if *Gardner-Denver* bars ALPA from entering into any agreement that would require the pilots it represents to arbitrate all statutory discrimination claims, Northwest must still obtain ALPA's permission to negotiate such agreements directly with the individual pilots, because such agreements concern rates of pay, rules and working conditions. The court of appeals rejected this holding, reasoning that it would require an employer to bargain about a proposal "that the union is not authorized to accept and the employer could not enforce." (App. 14a). The court stated that "a proposal to trade that which is not one's to give cannot be a mandatory subject of bargaining." (*Id.*) It did not explain why it thought this principle excused the employer from bargaining about whether *individual* pilots would be asked or required to sign arbitration agreements.

Finally, the court held that unions have no bargaining role even with respect to the procedures to be incorporated into such individual arbitration agreements. It stated:

> [A]s we read *Gardner-Denver* and *Gilmer*, ALPA can have no role in negotiating obligatory procedural rules for arbitration of individual statutory claims. Read together, those cases establish that only the individual can determine in what forum he will vindicate his statutory rights, and this choice should not be burdened by the majoritarian concerns that motivate a union. If a union has a mandatory role in negotiating the terms that will apply to arbitration, then it could also contrive to discourage the exercise of the employee's right to choose a forum.

(App. 16a).

REASONS FOR GRANTING THE WRIT

I.

This case provides the Court an opportunity to resolve definitively an important question of labor law concerning which the Court has acknowledged its prior decisions are in some "tension." That question is whether a union has authority, as collective bargaining representative, to enter into an agreement that requires the represented employees to submit to binding arbitration any claims arising under federal anti-discrimination statutes. The courts of appeals are also divided on this issue: most, like the court below, have answered the question in the negative (*see* cases cited in the opinion below at App. 13a), but the Fourth Circuit has consistently answered it in the affirmative. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996); *Carson v. Giant Food, Inc.*, 175 F.3d 325 (4th Cir. 1999).

The question was most recently considered, but not decided, by this Court in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 77, 82 (1998). The Court granted certiorari in that case to review a Fourth Circuit decision which had held that a union-negotiated arbitration clause in a collective bargaining agreement precluded a covered employee from suing in federal court on a claim arising under the Americans with Disabilities Act. In discussing the merits of that case, this Court observed that the Fourth Circuit's decision "brings into question two lines of our case law"—one represented by *Gardner-Denver* and its progeny[3] and the other represented by *Gilmer* and earlier cases on which it relied[4]—and that "[t]here is obviously some tension between these two lines of cases." *Id.* at 75-76. The Court went on to explain:

> Whereas *Gardner-Denver* stated that "an employee's rights under Title VII are not susceptible of prospective waiver," 415 U.S., at 51-52, *Gilmer* held that the right to a federal judicial forum for an ADEA claim could be waived. Petitioner and the United States as *amicus* would have us reconcile the lines of authority by maintaining that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts—a distinction that assuredly finds support in the text of *Gilmer*, see 500 U.S., at 26, 35. Respondents and their *amici*, on the other hand, contend that the real difference between *Gardner-Denver* and *Gilmer* is the radical change, over two decades, in the Court's receptivity to arbitration . . .;

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[3] *E.g., McDonald v. West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).

[4] *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

> *Gilmer*, they argue, has sufficiently undermined *Gardner-Denver* that a union *can* waive employees' rights to a judicial forum."

525 U.S. at 76-77.

In the end, the Court did not resolve this dispute. Instead, it held that even if a union has authority to waive an individual's right to sue under these federal statutes, such a waiver must be "clear and unmistakable." The general arbitration clause that was at issue in *Wright* did not meet that test. The Court therefore concluded:

> We hold that the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. We do not reach the question whether such a waiver would be enforceable.

525 U.S. at 82.

In the present case, the question whether a union has authority to enter into a binding arbitration agreement applicable to individual employee claims arising under federal anti-discrimination statutes is squarely presented—not in reference to any particular arbitration clause but generically, in terms of defining the scope of mandatory collective bargaining under the Railway Labor Act. In other words, the question here is whether a union can negotiate any kind of mandatory arbitration clause applicable to such statutory claims.[5]

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[5] Although this case happens to arise under the Railway Labor Act, the issue presented would be exactly the same under the National Labor Relations Act (NLRA), which similarly defines the scope of collective bargaining under that statute as covering "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Thus, the decision below is effectively the controlling precedent for NLRA cases as well,

The court of appeals thought this question had been answered in *Gardner-Denver*, and that its duty as a lower court was to follow that ruling: "We . . . leave to the [Supreme] Court itself the prerogative of overruling its own precedent (if it will); we apply the law as it stands." (App. 12a-13a). But *Gardner-Denver* did not so much decide this question as assume the answer, based on the then-existing precedent of *Wilko v. Swan*, 346 U.S. 427 (1953). In *Wilko*, which involved a suit under the Securities Act of 1933, the Court had held that when Congress creates a nonwaivable statutory right and provides a judicial forum for its enforcement, an arbitration agreement cannot be raised as a defense to an enforcement action under the statute. It was on the basis of this precedent that the Court in *Gardner-Denver* concluded that "an employee's rights under Title VII are not susceptible of prospective waiver." 415 U.S. at 51-52. Of course, the Court subsequently retreated from and eventually overruled *Wilko*, in a series of cases that it later relied upon in *Gilmer*. See cases cited at page 7, note 4, *supra*. But the Court has yet to decide whether this change in its thinking about arbitration of statutory claims generally should also change the views expressed in *Gardner-Denver* concerning a union's authority to negotiate arbitration agreements applicable to statutory discrimination claims.

Moreover, the Court's pronouncements in *Gardner-Denver* concerning a union's authority are only dicta, since that question was not presented in the case. Rather, the issue there was whether an employee who had submitted a *contractual* discrimination claim to arbitration under a collective bargaining agreement and obtained an adverse award was thereby precluded from bringing a *statutory* discrimination claim in Court. The arbitration provision in

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since all NLRA cases are subject to review in the District of Columbia Circuit. *See* 29 U.S.C. § 160(f).

that case did not specifically cover statutory claims, nor had any statutory claim been submitted to arbitration. Thus, the extent of a union's authority to negotiate concerning arbitration of statutory claims was not directly presented.

Given the continuing conflict among the circuits on this issue, and the tension in this Court's own decisions, the matter should be definitively decided in this case.

II.

If this Court should determine that a union may not itself enter into a collective agreement that requires arbitration of statutory discrimination claims, then the second question presented by this case would arise. That question is whether an employer must nevertheless bargain with the union before entering into individual arbitration agreements with union-represented employees. ALPA's contention throughout this case has been that an arbitration requirement applicable to discrimination claims arising out of the employment relationship—whether that arbitration requirement is embodied in a collective agreement or an individual agreement—is a "rule" or "working condition" within the meaning of the Railway Labor Act, 45 U.S.C. § 152, and therefore within the scope of collective bargaining mandated by the Act. If this is so, then an employer cannot enter into individual arbitration agreements without first bargaining with the union.[6] Such bargaining would deal, for example,

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[6] Indeed, if the matter is a mandatory subject of collective bargaining, the employer would presumably be prohibited from entering into individual arbitration agreements at all without the union's consent. It is a well-recognized principle under both the Railway Labor Act and the National Labor Relations Act that an employer may not contract with individual employees concerning matters that are within the scope of mandatory collective bargaining except with the consent of the collective bargaining representative. *See Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944); *Steele v. Louisville & Nashville*

with such matters as whether the individual arbitration agreements will be voluntary or required by the employer as a condition of hire or retention, and in either case what the terms of the arbitration procedure will be—*i.e.*, how the arbitrator will be selected, who will pay the costs of the arbitration, what discovery will be permitted, what remedies may be provided, and the like.

The court of appeals construed this Court's decisions in *Gardner-Denver* and *Gilmer* as precluding the union not only from imposing arbitration of statutory claims through a collective agreement, but also from playing any collective bargaining role with respect to any aspect of individual arbitration agreements. We believe this interpretation of these decisions is not only mistaken but inconsistent with fundamental policies of both federal labor law and the federal anti-discrimination statutes. In any event, the issue presented is of sufficient importance—and sufficiently in doubt—to warrant review by this Court.

The court of appeals reasoned that if the union is precluded from agreeing to a mandatory arbitration provision that would be binding on the employees, then the entire subject of arbitration of statutory claims cannot be a matter for collective bargaining. As the court put it, "a proposal to trade that which is not one's to give cannot be a mandatory subject of bargaining." (App. 14a). We believe this reasoning confuses the question of what specific terms a union may *agree to* in collective bargaining with the question of what general *subjects* the parties are required to bargain about. Even if a union cannot agree to an arbitration provision that would be binding on employees, there are other issues relative to the general subject of arbitration of statutory

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R.R., 323 U.S. 192, 200 (1944); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

claims that the parties could still negotiate about and agree upon. One such issue would be whether the employer will request employees to sign individual arbitration agreements at all, and if so, whether employees will have the option to decline or whether the agreements will be a mandatory condition of hire or retention. Another issue would be what specific rules and procedures such individual arbitration agreements must contain.

The court of appeals thought that bargaining about any such matters would be inconsistent with *Gardner-Denver* and *Gilmer*. It read those cases as giving each individual employee an affirmative legal right to "determine in what forum he will vindicate his statutory rights, and this choice should not be burdened by the majoritarian concerns that motivate a union." (App. 16a). If unions were given any bargaining authority in this area, the court said, they might "contrive to discourage the exercise of the employee's right to choose a forum." (*Id.*)

Contrary to the court of appeals, we find nothing in either *Gardner-Denver* or *Gilmer* that suggests the existence of a protected employee right to choose arbitration, rather than the courts, as the forum for enforcing their statutory discrimination claims. In *Gardner-Denver* the Court's concern was with protecting the employee's statutory right to *judicial* enforcement of his claim; there is no mention of a right to choose arbitration. And while *Gilmer* held that an individual employee's arbitration agreement was enforceable under the Federal Arbitration Act, that result was not based on any notion of protecting the employee's choice of forum. On the contrary, the arbitration agreement in that case was enforced *despite* the employee's lack of free choice; he had been forced to sign the arbitration agreement at issue in that case as a condition of becoming a registered securities representative. It is obvious from the fact that the *Gilmer* case was brought as

a lawsuit in federal court that the plaintiff preferred judicial enforcement of his claim, not arbitration.

Furthermore, while it is theoretically conceivable that an individual employee might prefer arbitration over judicial enforcement of his anti-discrimination rights, in reality it will almost always be the employer who wants to replace the judicial forum with arbitration. And unless there is a union that has authority to represent the employees with respect to this issue, they will have no real choice in the matter. The employer will simply require an arbitration agreement as a condition of employment—as it did here and in *Gilmer*. Therefore, if the goal is to give employees maximum free choice, the way to achieve that goal is not to deny the union bargaining authority, as the court of appeals thought, but rather to hold that individual arbitration agreements are within the scope of collective bargaining under the Railway Labor Act. Given the authority to bargain about the matter, the union will be able to bring to bear the collective bargaining power of the employees either to dissuade the employer from demanding individual arbitration agreements at all, or to negotiate with the employer a form of arbitration agreement that is acceptable to the employees, rather than one imposed unilaterally by the employer.

That result, we believe, would be far more consistent with the fundamental goals of both the Railway Labor Act and the federal anti-discrimination statutes than the one reached below. Not only would unions be allowed to play their statutorily assigned role of representing employees with respect to "rates of pay, rules, and working conditions," but in doing so they would provide maximum protection for the employees' right to a judicial forum for the enforcement of any claims arising under the anti-discrimination statutes. Collective bargaining would also tend to ensure that, if arbitration of statutory claims is agreed to, the arbitration procedure would be one that is protective of employee rights

and interests, which may not be the case if the procedure is devised solely by the employer.

These issues are worthy of the Court's consideration. They are important to the administration of both the federal labor-relations laws and the federal anti-discrimination statutes. They will arise frequently, as increasing numbers of employers require their employees, as a condition of employment, to sign mandatory arbitration agreements applicable to statutory anti-discrimination claims. And there is at least strong reason to believe that they were decided erroneously below.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7196

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Appellee/Cross-Appellant

v.

NORTHWEST AIRLINES, INC.,
Appellant/Cross-Appellee

Consolidated with 98-7202

Appeals from the United States District Court
for the District of Columbia
(No. 97cv01917)

Argued September 9, 1999
Decided December 28, 1999

John J. Gallagher argued the cause for appellant/cross-appellee. With him on the briefs were *Cathy Wassberg, Neal D. Mollen, and Intra L. Germanis.*

Jerry Anker argued the cause for appellee/cross-appellant. With him on the briefs were *Elizabeth Ginsburg* and *James K. Lobsenz.*

Before: GINSBURG, SENTELLE, and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge:* For more than 30 years Northwest Airlines has required newly hired pilot trainees to sign individual employment contracts called "Conditions of Employment." In 1995 Northwest added several new provisions to the Conditions, including a clause under which each trainee agreed to binding arbitration of any claim he might have against Northwest for discrimination in employment.

The Air Line Pilots Association (ALPA), which is the union that represents Northwest pilots once they have completed their training, filed suit claiming that the carrier violated the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, by requiring individual trainees to agree to the Conditions without first having bargained with ALPA over them. The district court granted partial summary judgment for each party; the court enjoined Northwest, pending completion of the bargaining and mediation process, from applying the Arbitration Clause to pilots who have completed their training and are represented by ALPA, but refused to enjoin the use of any other of the Conditions.

Northwest appeals, claiming that under *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the arbitration of individual statutory claims is not a mandatory subject of collective bargaining and that Northwest is therefore free to bargain individually with its employees over the Arbitration Clause. We agree and accordingly reverse the judgment of the district court on this issue.

ALPA cross-appeals, claiming the district court should have enjoined the use of other provisions that Northwest added to the Conditions in 1995. Because, in light of subsequent events, the cross-appeal does not present a live

controversy, we dismiss ALPA's claim without prejudice to its raising the same claim in the future.

I. Background

The relationship between Northwest and ALPA is governed by the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* Under RLA § 2 First, 45 U.S.C. § 152 First, the carrier is required to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." This statutory obligation to bargain with the union in good faith is backed up by RLA § 2 Seventh, 45 U.S.C. § 152 Seventh, which provides that "[n]o carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in [§ 6 of the RLA]." In other words, if the carrier is unable to reach agreement with the union on changing a rate of pay, rule, or working condition, then it must maintain the status quo until it has satisfied the multi-step process of negotiation, mediation, arbitration, and cooling-off required under RLA § 6, 45 U.S.C. § 156. *See Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union*, 396 U.S. 142, 149 (1969) (describing negotiation process under § 6 as "almost interminable"). If at the end of that process the parties have not reached an agreement, then the employer may unilaterally implement its proposal and the union may resort to economic self-help to resist the change.

Matters that are "directly related to 'rates of pay, rules, and working conditions'," and may therefore trigger the obligations of RLA § 2 First and Seventh, are denominated "mandatory subject[s] of collective bargaining," a phrase courts have borrowed from case law arising under the National Labor Relations Act. *Japan Air Lines Co. v. International Ass'n of Machinists*, 538 F.2d 46, 52 (2d Cir. 1976). If a carrier and a union have a dispute over a proposed

change to a mandatory subject of bargaining, then the union can get an injunction prohibiting the carrier from unilaterally implementing the change before completing the lengthy negotiation process set out in § 6. On the other hand, if the dispute is over a non-mandatory subject, then the carrier may unilaterally implement the change unless limited by an existing collective bargaining agreement (CBA).

A. Northwest's Practice, 1966-97

ALPA has represented the pilots of Northwest Airlines in collective bargaining for nearly 60 years. When a pilot first begins his training with Northwest, he is not represented by ALPA or by any other union. When the pilot completes his training and enters into "revenue service" as a probationary employee, however, he immediately becomes a member of the bargaining unit represented by ALPA.

As early as 1966 Northwest unilaterally began to require that each trainee pilot agree to the Conditions as part of his contract of employment. The earliest known Conditions included provisions covering such matters as the trainee's pay, permission to use his likeness in promotions, and the assignment of rights to anything he might invent. Although trainees are not represented by ALPA when they agree to the Conditions, some of the Conditions either expressly or implicitly continue to apply for as long as the signatory remains employed as a pilot with Northwest, that is, even after the pilot becomes a member of the bargaining unit represented by ALPA.

Over the course of three decades Northwest made numerous changes to the Conditions without consulting ALPA. In 1995 the airline added an Arbitration Clause requiring employees to submit to binding arbitration all claims against it arising from the employment relationship. Of particular relevance to this appeal, the Arbitration Clause

specifically requires binding arbitration of statutory employment discrimination claims brought under "the Minnesota Human Rights Acts, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, or any other state or federal law prohibiting employment discrimination" (citations omitted). Also in 1995, Northwest unilaterally introduced other new Conditions: (1) setting the pilot's monthly salary during the probationary period, when he has completed his training and is represented by ALPA; (2) requiring the pilot to submit to a medical examination if Northwest has reason to believe he is no longer able to perform his essential job functions; (3) acknowledging that Northwest may change various working conditions at its option; and (4) acknowledging that failure to comply with company rules is a ground for termination.

B. ALPA's Objection, 1997-Present

In 1997 Northwest notified ALPA that it was terminating a probationary pilot and attached to the notice a copy of the Conditions he had signed. ALPA, which claims that this was the first it had learned of the Conditions, demanded that Northwest cease requiring trainee pilots to agree to them and that it inform each pilot who had signed Conditions that they were null and void. When Northwest refused to do so, ALPA filed suit in district court seeking injunctive and declaratory relief on the ground that Northwest had violated the RLA by unilaterally implementing the Conditions, which ALPA alleged are individual contracts concerning mandatory subjects of bargaining, without first negotiating with the Union as required by the RLA.

While the suit was pending before the district court, Northwest, in an attempt to respond to some of ALPA's concerns regarding the 1995 Conditions, deleted three and revised one of the provisions to which the Union objected. In presenting

the new version (the 1997 Conditions) to ALPA, Robert Brodin, Northwest's vice president for labor relations, wrote:

> Northwest has never interpreted or applied the Conditions of Employment to operate in derogation of the collective bargaining agreement between Northwest and ALPA. Northwest and ALPA both agree that in the event of overlap or inconsistency, the collective bargaining agreement controls.

As to the Arbitration Clause in particular, however, Brodin wrote that "Northwest continues to believe that it has the right to insist on arbitration of non-contract claims as a condition of employment for new hires." The only significant change Northwest made to the Arbitration Clause was to clarify that it does not apply to claims arising out of the CBA between Northwest and ALPA.

Both ALPA and Northwest moved for summary judgment on the validity of the Conditions. The district court first considered whether Northwest's use of Conditions originating before 1995 violated the RLA. The court held that ALPA, by its failure to object to the Conditions for some 30 years, had arguably consented to them, which if true would make use of the Conditions an implied term of the CBA between Northwest and ALPA. Because that dispute related solely to the meaning of the CBA, the court held it could be resolved only by binding arbitration pursuant to RLA §§ 2 Sixth and 3 First, 45 U.S.C. §§ 152 Sixth and 153 First.

The court concluded that ALPA had objected in a timely fashion, however, to the Arbitration Clause introduced in 1995, and therefore had not acquiesced in Northwest's use of that term. The district court then held that the Arbitration Clause deals with a mandatory subject of bargaining. Because the Arbitration Clause would have worked a change with respect to a mandatory subject and ALPA had neither agreed to nor acquiesced in that change, the court enjoined

Northwest from applying the Arbitration Clause to any pilot represented by ALPA.

The district court did not address the question whether other clauses ALPA claimed were newly included in the 1995 Conditions also violated the RLA. ALPA therefore moved to amend the court's order so as to enjoin Northwest from implementing those clauses but the district court denied the motion because of ALPA's failure to comply with local court rules.

II. Analysis

ALPA does not challenge the district court's determination that Northwest's use of Conditions originating before 1995 must be resolved through binding arbitration. Therefore, both Northwest's appeal and ALPA's cross-appeal concern only the Union's request for an injunction against Northwest's use of particular provisions that ALPA maintains first appeared in the 1995 Conditions.

A. Northwest's Appeal: The Arbitration Clause

Is the arbitration of statutory discrimination claims a mandatory subject of bargaining? Northwest says not and claims the district court erred in enjoining its use of the Arbitration Clause, reasoning as follows. Under *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a union cannot waive the right of the employees it represents to bring a statutory discrimination claim in a judicial forum. Because ALPA cannot agree to such a provision, it cannot be a mandatory subject of bargaining. Therefore, Northwest is free to deal directly with its employees over the arbitration of such claims.

For its part, ALPA urges that the arbitration of statutory claims is a mandatory subject, and that we should therefore affirm the district court's judgment, for three independent but related reasons. First, *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20 (1991) "effectively supersedes" *Gardner-Denver*. If, as ALPA reads *Gilmer*, a union may in collective bargaining waive the employees' right to a judicial forum for a statutory discrimination claim, then there is no reason to doubt that the arbitration of statutory claims is a mandatory subject of bargaining. Second, even if *Gardner-Denver* is still good law, it has no effect upon whether arbitration of statutory claims is a mandatory subject of bargaining. In other words, as the district court held, Northwest must bargain with ALPA over the Arbitration Clause regardless whether ALPA could lawfully agree to it because it is directly related to "rates of pay, rules, or working conditions." Third, even if waiver of the right to a judicial forum is not a mandatory subject of bargaining because ALPA cannot agree to such a waiver under *Gardner-Denver*, the procedural rules for arbitration, as specified in the Arbitration Clause, are mandatory subjects of bargaining.

In *Gardner-Denver*, the Supreme Court considered whether an employee who had pursued arbitration of a racial discrimination claim under a CBA was thereby precluded from later asserting a Title VII claim based upon the same facts. 415 U.S. at 46-55. The Supreme Court held that "there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51. Because Title VII provides each individual with the right to be free of invidious discrimination, "the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Id.* Therefore, although the union could and did prospectively waive the employee's right to sue upon (rather than arbitrate) his claim of discrimination in violation of the CBA, the employee's resort to arbitration of this claim did not preclude him from suing upon his statutory claim of discrimination. *See id.* at 51-52.

The Supreme Court also rejected the suggestion that a court should dismiss a Title VII claim if the facts underlying it had already been the subject of arbitration under a CBA that prohibited, and provided a remedy for, the discrimination. According to the Court, arbitral processes were inferior to judicial processes for protecting statutory rights, and the Congress intended the federal courts to exercise final responsibility over Title VII claims. *See id.* at 56-59. The Court was particularly concerned that a union, which ordinarily controls the arbitration of an employee's claim, might, if allowed, compromise the would-be Title VII plaintiff's statutory rights: "In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.* at 58 n.19.

In the early 1980s the Supreme Court twice applied the reasoning of *Gardner-Denver* beyond the context of Title VII. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), employees had filed suit under the Fair Labor Standards Act after having lost in arbitration on a contractual claim arising from the same facts. The employer argued that the employees' union had waived their right to bring the FLSA claim in court, noting that the CBA required employees to arbitrate "any controversy" and that the employees had in fact pursued this matter to arbitration. *Id.* at 736. The Court rejected this argument:

> [T]he FLSA rights petitioners seek to assert in this action are independent of the collective bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable. Because Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral

> forum, we hold that petitioners' claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures.

Id. at 745. In *McDonald v. City of West Branch*, 466 U.S. 284 (1984), the Supreme Court rejected the employer's argument that an employee's § 1983 claim should be dismissed because he had already pursued to arbitration under the CBA a claim based upon the same facts. The Court premised its holding upon two factors: the inadequacy of arbitration for the enforcement of individual statutory rights, and the intention of the Congress that § 1983 be judicially enforced. *See id.* at 289-90.

In light of the Court's broad pronouncement in *Gardner-Denver* that "there can be no prospective waiver of an employee's rights under Title VII," and the application of this principle to other federal statutes in *Barrentine* and *McDonald*, many courts concluded that the reasoning of *Gardner-Denver* applied to still other federal employment statutes, *see Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) (Americans with Disabilities Act); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1553 (10th Cir. 1988) (Age Discrimination in Employment Act (ADEA)), and held that *Gardner-Denver* precluded prospective waiver of the right to sue even by the individual employee, *see Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 107 (5th Cir. 1990) (Title VII), *vacated for reconsideration*, 500 U.S. 930 (1991), in light of *Gilmer; Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989) (Title VII); *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 229 (3d Cir. 1989) (ADEA), *disapproved in Gilmer*, 500 U.S. 20, 24 n.1 (1991); *Swenson v. Management Recruiters Int'l Inc.*, 858 F.2d 1304, 1306 (8th Cir. 1988) (Title VII).

In 1991, however, the Court staked out a limit to the principle announced in *Gardner-Denver*. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court held

that a claim arising under the ADEA was validly made subject to binding arbitration by an agreement between the employer and the individual (non-union) employee—a result in some tension with the broad pronouncement in *Gardner-Denver* that "there can be no prospective waiver of an employee's rights under Title VII." 415 U.S. at 51. The Court began by noting that under the Federal Arbitration Act (FAA) an agreement to arbitrate individual statutory rights is enforceable unless the Congress intended to preclude waiver of access to a judicial forum for vindication of that right. *See id.* at 26. The text and legislative history of the ADEA reflect no such intent, and the Court rejected the argument that waiver should be precluded because arbitration is an inferior mechanism for resolving individual statutory claims—an argument to which the Court had given some weight in *Gardner-Denver, Barrentine,* and *McDonald, see id.* at 34 n.5. The Court expressly distinguished those cases as follows:

> First, [they] did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA . . . . Therefore, those cases provide no

> basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

Id. at 35.

Thus, *Gilmer* establishes that an individual employee may himself validly agree in advance to binding arbitration of a statutory claim he may later have against his employer. *See Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1478 (D.C. Cir. 1997) (citing *Gilmer* for the "general rule [that] statutory claims are fully subject to binding arbitration, at least outside of the context of collective bargaining"). The Court in *Gilmer* did not, however, address the continuing vitality of the statement in *Gardner-Denver* that "the rights conferred [by Title VII] can form no part of the collective bargaining process." 415 U.S. at 51; *see also Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 396 (1998) (raising but not resolving the question "whether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*").

ALPA suggests that *Gilmer* "effectively supersedes" *Gardner-Denver* and permits a union to waive the employees' right to a judicial forum for statutory claims. The Fourth Circuit and some district courts agree, *see Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir. 1996); *see, e.g., Almonte v. Coca-Cola Bottling Co.*, 959 F.Supp. 569, 573-74 (D. Conn. 1997), prematurely we think.

Whatever the Supreme Court said—or, more precisely, refrained from saying—in *Wright*, we do not understand the Court in *Gilmer* to have overruled *Gardner-Denver*. Rather, the Court expressly distinguished that case, which strongly implies that it remains the law within its field of application. We therefore leave to the Court itself the prerogative of overruling its own precedent (if it will); we apply the law as it

stands. *See Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989).

We see a clear rule of law emerging from *Gardner-Denver* and *Gilmer:* Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him. All of the circuits to have considered the meaning of *Gardner-Denver* after *Gilmer*, other than the Fourth, are in accord with this view. *See Albertson's, Inc. v. United Food & Com. Workers Union*, 157 F.3d 758, 761-62 (9th Cir. 1998); *Penny v. United Parcel Service*, 128 F.3d 408, 413-14 (6th Cir. 1997); *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 526 (11th Cir. 1997); *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir. 1997); *cf. Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir. 1997) (individual represented by union need not exhaust remedies under CBA before filing statutory claim in court); *Varner v. National Super Market, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (same); *Tran v. Tran*, 54 F.3d 115, 117-18 (2d Cir. 1995) (same); *see also Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1478-79 (D.C. Cir. 1997) ("It is plain that the Supreme Court saw a critical distinction in the situations raised by *Gardner-Denver* and *Gilmer: Gardner-Denver* involved arbitration in the context of collective bargaining . . . . *Gilmer*, on the other hand, raised an individual employee claim outside the collective bargaining context").

Thus, even after *Gilmer*, *Gardner-Denver* stands as a firewall between individual statutory rights the Congress intended can be bargained away by the union, *see, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 706-07 & n.11 (1983) (union may waive officers' statutory right to be free of discrimination, such as enhanced discipline, based upon union activity), and those that remain exclusively within the individual's control. Absent congressional intent to the contrary, a union may not use the employees' individual

statutory right to a judicial forum as a bargaining chip to be exchanged for some benefit to the group; the statutory right "can form no part of the collective bargaining process." *Gardner-Denver*, 415 U.S. at 51. Applying this rule to the facts of the present case, ALPA could not lawfully agree to the Arbitration Clause because it would effect a waiver of the employees' right to a judicial forum for the vindication of their statutory claims of discrimination in employment.

ALPA argues, however, that even if *Gardner-Denver* precludes it from waiving employees' right of access to a judicial forum for a statutory claim, the arbitration of an employment-related claim—whatever the legal basis for the claim—remains a mandatory subject of bargaining. The district court agreed, holding that the Arbitration Clause is a mandatory subject of bargaining "regardless of whether [ALPA] can itself enter into arbitration agreements on behalf of its members" because the Clause "governs rules or conditions of the pilots' employment with Northwest." In effect, the district court held that an employer has to bargain over a proposal concerning rates of pay, rules, or working conditions that the union is not authorized to accept and the employer could not enforce.

We cannot agree. The "essence of collective bargaining is a notion of mutuality, that if a subject is brought up each side has at least the authority both to offer and to concede." *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R.R. Co.*, 385 F.2d 581, 603 (D.C. Cir. 1967). It follows that a proposal to trade that which is not one's to give cannot be a mandatory subject of bargaining. *See Brotherhood of R.R. Trainmen*, 385 F.2d at 603-04 (proposal to bargain over effects of job terminations, normally a mandatory subject, held non-mandatory because union "could not bargain away any part of the rights that accrued to employees under the [arbitral] Award"); *Southern Pacific Co. v. Switchmen's Union*, 356 F.2d 332, 334-35 (9th Cir. 1966) (proposal to

redefine certain work as within particular craft held non-mandatory because railroad could not lawfully agree to it: "These then are not such disputes as can be resolved by capitulation of the railroad and thus are not the proper subject [for bargaining under RLA] section 6"). Because *Gardner-Denver* precludes ALPA from agreeing to binding arbitration of individual statutory claims, we conclude that the Arbitration Clause is not a mandatory subject of bargaining.*

ALPA argues next that the district court properly enjoined Northwest's implementation of the Arbitration Clause even if the waiver of employees' right to a judicial forum for statutory claims is not a mandatory subject, because ALPA can still lawfully bargain over the procedures to be used in arbitration. The Union claims these procedures are a mandatory subject of bargaining because the remedy awarded to a successful complainant in the arbitration of a discrimination claim could affect the "rates of pay, rules, or working conditions" of all employees, for example by restructuring their seniority rights.

We fail to see how a remedy imposed by an arbitrator in a proceeding involving only the employer and an individual employee could have any adverse effect upon the working conditions of the employees in the bargaining unit. Although an arbitral award could indeed subject the employer to an obligation inconsistent with the CBA, that is not the Union's problem but the employer's: the employer simply cannot make any unilateral change respecting a mandatory subject of bargaining without first negotiating with the Union as required under the RLA, and a private arbitration between the

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* Although Gardner-Denver suggests that the arbitration of individual statutory claims is an impermissible subject of bargaining, we need not decide today whether it is an impermissible or a permissible subject; the only issue presented is whether it is a mandatory subject. *See Brotherhood of Railroad Trainmen*, 385 F.2d at 604 n.52.

employer and an individual employee does not alter this rule of law.

In any event, as we read *Gardner-Denver* and *Gilmer*, ALPA can have no role in negotiating obligatory procedural rules for arbitration of individual statutory claims. Read together, those cases establish that only the individual can determine in what forum he will vindicate his statutory rights, and this choice should not be burdened by the majoritarian concerns that motivate a union. If a union has a mandatory role in negotiating the terms that will apply to arbitration, then it could also contrive to discourage the exercise of the employee's right to choose a forum.

We conclude that the Arbitration Clause is not a mandatory subject of bargaining under the RLA. Therefore, Northwest is not required by RLA § 2, 45 U.S.C. 152, to negotiate with ALPA over it. Instead, Northwest may, as it did, propose the Arbitration Clause directly to each individual employee. While it has long been clear that "members [of a bargaining unit] cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining," *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), it is just as well-established that an employee represented by a union may bargain directly with his employer over a non-mandatory subject of collective bargaining as long as the proposed individual contract "is not inconsistent with a collective agreement" or somehow implicated in an unfair labor practice, *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944).

Here, the Arbitration Clause applies only to the statutory rights of individuals and is not inconsistent with the CBA; nor is Northwest using its direct dealings with the employees either to change anyone's obligations under the CBA or to avoid dealing with the union on a mandatory subject of bargaining. Under these circumstances, the RLA is no bar to Northwest's contracting individually with its employees.

B. ALPA's CrossAppeal: Other Clauses New in 1995

ALPA claims the district court erred in failing to enjoin Northwest from unilaterally implementing provisions other than the Arbitration Clause that the carrier added to the 1995 Conditions and that concern mandatory subjects of bargaining. Northwest counters that ALPA's cross-appeal does not present a ripe controversy in light of the airline's adoption of the scaled-down 1997 Conditions and its subsequent representations concerning their application. For the reasons stated below, we agree with Northwest and dismiss ALPA's cross-appeal for want of a ripe controversy.

In 1997 Northwest dropped three of the clauses in the 1995 Conditions about which ALPA now complains. ALPA asserts that its challenge to these three clauses remains ripe because "Northwest has done nothing . . . to alter or revoke the 1995 [Conditions] that have been signed by 1050 Northwest pilots, and that still remain in effect." At oral argument before this court, however, Northwest deliberately and unequivocally represented that the 1997 Conditions supersede any previous Conditions, and that the three clauses deleted in 1997 will not be enforced against persons who signed the 1995 (or prior) Conditions.

Although we are aware that "voluntary cessation of allegedly illegal conduct does not . . . make the case moot," a claim for injunctive relief still requires "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *see also Community for Creative Non-Violence v. Hess*, 745 F.2d 697, 700-01 (D.C. Cir. 1984). ALPA's only response to this requirement is to say that at some time in the future Northwest might not honor its representation to the court. That is insufficient to render ALPA's requests for injunctive relief ripe at this time. If in the future Northwest were to enforce one of the clauses against a signatory employee, or

were to indicate its "firm intention" to do so, *Andrade v. Lauer*, 729 F.2d 1475, 1481 (D.C. Cir. 1984), then the Union would have a ripe claim for injunctive relief; at present, however, "the parties have no live dispute . . . and whether one will arise in the future is conjectural," *Anderson v. Green*, 513 U.S. 557, 559 (1995).

ALPA's only other concern is with the amended version of the Rules of Conduct clause in the 1997 Conditions. ALPA objected to the Rules of Conduct clause in the 1995 Conditions because it stated that failure to comply with the company's rules and regulations "shall be grounds for [ ] termination," but termination is governed by the CBA. In 1997, therefore, Northwest amended the Rules of Conduct provision to provide that Northwest's authority to discipline an employee represented by the Union is "subject to the grievance and arbitration provisions of the applicable [CBA]." This revision, coupled with Northwest's firm representation that it will enforce the Rules of Conduct provision only to the extent allowed by the 1997 Conditions, would seem to render ALPA's claim for injunctive relief unripe.

At oral argument, however, ALPA suggested that the revised Rules of Conduct clause still presents a ripe controversy insofar as it provides that "the Company, in its sole discretion, may amend [its] rules, regulations, or policies from time to time." If Northwest ever "in its sole discretion" changed a rule, regulation, or policy concerning a mandatory subject of bargaining, then it would violate its obligation under the RLA to negotiate such changes with the Union. In response to concern over this part of the Rules of Conduct clause, Northwest represented to the court that, "as to mandatory subjects of bargaining, [Northwest] cannot and will not make unilateral changes. Because the union has a legitimate interest." By this representation Northwest acknowledges that the phrase "in its sole discretion" is

implicitly qualified by the laws of the United States, just as if the Condition said "provided, however, that Northwest may not make a change concerning a mandatory subject of bargaining without first negotiating with ALPA as required by the RLA."

In light of Northwest's representation, we fail to discern any present controversy over the Rules of Conduct clause. The parties agree that the clause does not affect Northwest's obligations under the RLA to negotiate with ALPA. Northwest has not invoked the clause to make any unilateral change concerning a mandatory subject of bargaining, and it unequivocally states that it will not do so in the future. ALPA's claim reduces to the fear that sometime in the future Northwest may renege upon this representation to the court. That possibility is speculative at best, and in our view utterly implausible. But should it ever come to pass, then the doors of the courthouse will be open wide to ALPA.

III. Conclusion

Northwest did not violate the RLA by implementing the Arbitration Clause without first negotiating with ALPA. In No. 98-7196, therefore, we vacate the injunction the district court entered against Northwest. In No. 98-7202, ALPA's cross-appeal, we do not find a ripe case or controversy at this time; accordingly, we dismiss that case without prejudice to ALPA's raising the same claim in the future.

It is so ordered

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[File Sept. 23, 1998]

Civil Action
No. 97-1917 (GK)

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff,

v.

NORTHWEST AIRLINES, INC.
Defendant.

MEMORANDUM OPINION

The Air Line Pilots Association, International ("ALPA" or "the union") brings suit against Northwest Airlines, Inc. ("Northwest") under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, to prevent Northwest from entering into or maintaining individual contracts of employment with newly-hired pilots. ALPA claims that such contracts violate the RLA.

This matter is now before the Court on the parties' cross-Motions for Summary Judgment [#7, #8]. Upon consideration of the Motions, Oppositions, Replies, and the entire record herein, for the reasons discussed below, Defendant's Motion for Summary Judgment [#7] is granted in part and denied in part, and Plaintiff's Motion for Summary Judgment [#8] is granted in part and denied in part.

I. Background[1]

Plaintiff ALPA is the collective bargaining representative for pilots employed by Northwest. Since 1940, ALPA has negotiated numerous collective bargaining agreements establishing rates of pay, rules, and working conditions for Northwest pilots.

Beginning in or around 1966, Northwest has required each of its prospective pilot employees to sign a document entitled "Conditions of Employment" ("COE") as a pre-condition to employment. ALPA claims to have had no knowledge of the existence of the pre-condition, but this claim is hotly disputed. Northwest has, over the years, modified the COE on numerous occasions; the precise terms of the COEs have thus changed over time. Northwest made each of these changes without the involvement of, or explicit notice to, ALPA.

Northwest notes that, since approximately 1966, nearly every newly-hired pilot at Northwest has signed a version of the COE form. It thus characterizes as "dubious" ALPA's assertion that it was unaware of the existence of the COEs. (Def.'s Disputed Facts ¶ 2.) Northwest suggests that, at most, only ALPA's staff members might have been unaware of the COEs, while Northwest pilots, given that they each signed the documents, were "unquestionably" aware of the documents. (*Id.*)

The COEs have always addressed: (1) wages to be paid during the applicant's training period with Northwest, before the applicant becomes a member of the class represented by

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[1] Pursuant to Local Rule 108(h), "[i]n determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." Accordingly, unless otherwise noted, the Court takes its facts from the uncontroverted statements contained in the parties' Statements of Undisputed Facts.

ALPA; (2) Northwest's use of the new hire's likeness in advertisements; and (3) Northwest's proprietary interest in inventions developed as a result of employment with Northwest.

In 1995, the COE form was modified to include a provision in which pilots agree to submit certain statutory and common law claims (*e.g.*, claims of discrimination in employment arising under Title VII of the Civil Right Act, 42 U.S.C. §§ 2000e *et seq.*) to binding arbitration ("the arbitration provision"). Since 1995, Northwest has hired approximately 1,050 pilots, each of whom has signed the version of the COE containing the arbitration provision.

In April 1997, Northwest informed ALPA Contract Administrator Rob Plunkett that it intended to discharge a pilot who had not yet completed his probationary period. (Plunkett Decl. at Ex. 2, Letter from Tice to Plunkett of 4/14/97; Plunkett Decl. ¶ 2.) Northwest's letter to Plunkett referenced "the conditions of employment [the pilot] signed when he was hired". (*Id.*) ALPA claims, but Northwest disputes, that it was only by virtue of the April 14 letter that ALPA become aware of Northwest's practice of requiring all pilots to sign the COE agreements at the time of hire. (Pl.'s Undisputed Facts ¶ 4; Def.'s Disputed Facts ¶ 2.)

In May 1997, ALPA notified Northwest that it believed the company's practice of requiring pilots to sign the COEs as a condition of hire violated the RLA, and demanded that Northwest cease the practice. When informal efforts to resolve the issue failed, ALPA filed the instant case.

ALPA's essential claim in this case is that RLA § 2 First, 42 U.S.C. § 152, prohibits an employer whose employees are represented for purposes of collective bargaining from negotiating individual contracts with those employees covering their "rates of pay, rules, and working conditions", unless the union has consented to the individual negotiations.

ALPA alleges that the COEs do in fact cover "rates of pay, rules, and working conditions", and states that it never consented to Northwest's engaging in the individual negotiations. It claims that the COEs create both actual and potential conflicts with the parties' collective bargaining agreement.

ALPA now seeks an injunction restraining Northwest from entering into additional COEs, a declaratory judgment declaring all COEs signed by Northwest pilots in the past null and void, and attorneys' fees and costs. (Compl. at 4.)

II. Standard of Review

Summary judgment will be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is "material" if it might affect the outcome of the action under the governing law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In determining whether the movant has met this burden, a court must consider all factual inferences in the light most favorable to the non-moving party. *McKinney v. Dole*, 765 F.2d 1129, 1135 (D.C. Cir. 1985) . Once the moving party makes its initial showing, however, the nonmoving party must demonstrate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; *McKinney*, 765 F.2d at 1135. Moreover, "[i]n determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the

statement of genuine issues filed in opposition to the motion." Local Rule 108(h).

III. Analysis

A. Statutory Background

The parties agree that this labor dispute is governed by the RLA. The RLA permits a class of employees to choose, by majority, a labor union through which the employees have the right to organize and bargain collectively. 45 U.S.C. § 152 Fourth. The RLA was extended in 1936 to cover the airline industry. *See Hawaiian Airlines. Inc. v. Norris, et al.*, 512 U.S. 246, 248 (1994).

The RLA requires employers to negotiate with their employees or their employees' representatives over changes affecting the rates of pay, working rules, or working conditions of their employees. 45 U.S.C. § 152 Sixth and Seventh; *see also Brotherhood of R.R. Trainmen, et al., v. Akron & Barberton Belt R.R. Co., et al.*, 385 F.2d 581, 601 (D.C. Cir. 1967). The statute provides for the settlement of disputes concerning employees' rates of pay, rules of employment, or working conditions, RLA § la(4) , as well as disputes arising out of grievances or the interpretation of collective bargaining agreements covering rates of pay, rules, or working conditions, *Id.* § la(5). 45 U.S.C. § 151a(4) and (5).

A labor dispute governed by the RLA will generally take one of two procedural paths to resolution, depending on how it is categorized. The RLA distinguishes two classes of controversy that arise between employers, or "carriers", and unions: "major disputes", in which a party seeks to create contractual rights, and "minor disputes", in which a party seeks to enforce existing contractual rights. *Consol. Rail Corp. v. Railway Labor Executives' Ass'n,* ("*Conrail*") 491 U.S. 299, 302 (1989).

The statutory bases for the "major dispute" category can be found in RLA §§ 2 Seventh and 6, 45 U.S.C. §§ 152 and 156. Section 2 Seventh states that "[n]o carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements" or through the mediation procedures established in RLA § 6, 45 U.S.C. § 156. 45 U.S.C. § 152 Seventh. Any attempted change by an employer of rates, rules, or working conditions can only be made in accordance with existing collective bargaining agreements between the employer and the union, or through established conference[2] or mediation procedures. Disputes arising under these RLA provisions thus fall into the "major" dispute category.

Thus, the RLA contemplates that the parties, when engaged in a major dispute, will undergo a lengthy process of bargaining and mediation. Until they have exhausted that process, the parties are required to maintain the status quo, and the employer may not implement the contested change in rates of pay, rules, or working conditions. 45 U.S.C. §§ 155 and 156.

District courts have subject-matter jurisdiction to enjoin violations of the status quo pending completion of the bargaining and mediation process. *Conrail*, 491 U.S. at 302-3 (citing *Detroit & T.S.L.R. Co. v. Transp. Union*, 396 U.S. 142 (1969) (additional citations omitted)). If the bargaining and mediation process ends and no agreement has been reached, the parties may then resort to the use of economic force, *i.e.*, strikes, lock-outs, etc.[3] *Conrail*, 491 U.S. at 303.

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[2] The term "conference" in the RLA refers to negotiations or discussions that take place between the representatives of employers and those of employees. *See, e.g.*, 45 U.S.C. § 152 Second.

[3] Section 5 First of the RLA does provide for arbitration of major disputes if mediation efforts are unsuccessful. The National Mediation

"Minor disputes" are resolved through a different process under the RLA. Their statutory bases are found in RLA §§ 2 Sixth and 3 First (i), 45 U.S.C. §§ 152 Sixth and 153 First. Section 2 requires employers and unions to attempt to resolve, through conferences, disputes "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions". 45 U.S.C. § 152. Should that process be unsuccessful, § 3 First has been interpreted by the courts to subject minor disputes to compulsory and binding arbitration. 45 U.S.C. § 153; *Conrail*, 491 U.S. at 303-04.

Minor disputes are thus resolved through arbitration, over which a System Board of Adjustment established by agreement of the parties ("Adjustment Board"), has exclusive jurisdiction.[4] RLA § 3 First, 45 U.S.C. § 153. Although courts may enjoin strikes arising out of minor disputes, *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30 (1957), "[j]udicial review of the arbitral decision is limited." *Conrail*, 491 U.S. at 304 (citing *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 93 (1978)); *see also*, 45 U.S.C. § 153.

B. Whether Northwest's Use of the COE Agreements Constitutes a Mandatory Subject of Bargaining

ALPA claims that most, if not all, of the subjects covered in the COE agreements affect Northwest pilots' "rates of pay,

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Board is required to attempt "to induce the parties to submit their controversy to arbitration." 45 U.S.C. § 155. Participation in arbitration is voluntary, however, pursuant to §7 First of the RLA. *Id.* at § 157.

[4] The Collective Bargaining Agreement Between ALPA and Northwest establishes a System Board of Adjustment known as the "Northwest Airlines Pilots' System Board of Adjustment" for the purpose of deciding disputes that arise under the terms of the Agreement. (Plunkett Decl. Ex. 1, Collective Bargaining Agreement Between ALPA and Northwest, at § 21.)

rules, and working conditions". As stated above, employers must negotiate with their employees' representatives over changes affecting employees' rates of pay, working rules, or working conditions. 45 U.S.C. § 152 Sixth and Seventh; *Brotherhood of R.R. Trainmen*, 385 F.2d at 601.

Northwest responds that many of the provisions of the COE agreements are outside the scope of bargainability, including the arbitration provision. The airline thus reasons that it is under no obligation to negotiate with the union over those issues.

Northwest has submitted different versions of the COEs as Exhibits to the Declaration of Robert Brodin. (Brodin Decl., Exs. A-O.) The COEs are similar to each other, with the exception of the version modified in 1995 which adds the arbitration provision. (Brodin Decl., Ex. 0.) Some of the topics covered by the COEs include:

1. Pay during the pilots' probationary period;
2. Northwest's right to require mandatory medical examinations of pilots to determine physical or mental fitness;
3. Northwest's right, during the entire duration of employment, to interpret and change, at its "sole option", policies regarding "working hours, vacations, sick leave, pay increases, promotions, garnishments and other working conditions";
4. Northwest's right to terminate pilots without cause and without notice during the probationary period of their employment;
5. Northwest's right to use, for any purpose, including advertising, any photograph of the pilots during their employment;
6. The pilots' obligations to disclose and assign to Northwest any invention "capable of being used by the

Company to its advantage" conceived by the pilots during the period of their employment;

7. The pilots' duty, during and after their terms of employment, to keep confidential certain information relating to the airline;

8. Rights of pilots over the age of 60 to continue flying as Second Officer so long as they follow certain procedures established by the airline; and, in the 1995 version of the COE,

9. Pilots' agreement to submit to binding arbitration any claims against or disputes with the company, "including pay, benefits, work rules, [and] discipline or termination . . . any claims which [a pilot] may have against the company arising from the employment relationship", including claims arising under Title VII of the Civil Rights Act 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 1201 *et seq.*, or any other state or federal law prohibiting discrimination. This provision also imposes upon the pilots the obligation to share equally with the airline the expenses of a neutral arbitrator and any court reporter.

This examination of the topics included in the COEs shows clearly that they are comprehensive agreements which impose many rules and policies on pilots that significantly impact their working conditions. For example, the COEs explicitly govern the pilots' rate of pay during their probationary period; give Northwest the "sole option" of changing, without notice, "working hours, vacations, sick leave, pay increases, promotions, garnishments and other working conditions"; and establish various rules and policies affecting the pilots both during and after their employment.

Given the fact that "[t]he scope of bargainability is extremely broad", *Brotherhood of R.R. Trainmen*, 385 F.2d 601, and that the COE agreements contain provisions that clearly govern the "rates of pay, rules, and working conditions" of represented pilots, the Court concludes that Northwest's use of the COEs constitutes a mandatory subject of bargaining. 45 U.S.C. §§ 152 Sixth and Seventh; *Brotherhood of R.R. Trainmen*, 385 F.2d at 601.

C. Whether the Arbitration Provision Constitutes a Mandatory Subject of Bargaining

In addition to disagreeing over whether the use of the COEs, as a general practice, constitutes a mandatory subject of bargaining, the parties dispute vigorously whether the arbitration provision, in particular, is a subject of mandatory collective bargaining.

ALPA argues that this provision, which provides for the mandatory arbitration of statutory claims, is a "working condition" subject to mandatory collective bargaining. As such, Northwest was required to bargain with ALPA prior to implementing the provision.

Northwest responds that it has no obligation to bargain with ALPA over the arbitration provision. It claims that there is a fundamental distinction between "collective rights", which are within the union's purview, and "individual rights" (such as those protected by anti-discrimination statutes like Title VII), which fall outside its authority. Therefore, according to Northwest, the decision whether to arbitrate statutory and wrongful discharge claims can form no part of the collective bargaining process because it relates to "individual rights".

Courts have indeed held that labor unions may not agree to a mandatory arbitration clause in the absence of explicit consent by each affected employee, since unions do not have

the authority to waive an individual employee's right to seek a judicial remedy to enforce a statutory right. See, *e.g.*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997). Northwest rightly reads these cases to prohibit ALPA from making a commitment on behalf of its members, absent each individual employee's consent, regarding mandatory arbitration of individual discrimination and discharge claims.

Northwest mistakenly concludes, however, that because ALPA may not waive employees' rights by agreeing to mandatory arbitration provisions, it follows that the union has no authority to bargain with Northwest over the use or terms of any agreement to arbitrate.

ALPA correctly points out that, regardless of whether it can itself enter into arbitration agreements on behalf of its members, Northwest is nevertheless required, under § 2 Seventh of RLA, 45 U.S.C. § 152, to obtain the union's consent before it can execute individual contracts affecting the "rates of pay, rules, or working conditions" of represented employees.

The arbitration provision sets forth the manner in which pilots must resolve certain grievances arising from and thus related to their employment with Northwest. Northwest and ALPA have negotiated, and have included in the provisions of their collective bargaining agreement, the manner in which other "grievance[s] concerning any action of the Company" are to be resolved. (Plunkett Decl. Ex. 1, Collective Bargaining Agreement between ALPA and Northwest, at §§ 20-21.) Sections 20-21 of the collective bargaining agreement provide for appeal of an airline decision regarding those grievances to the Adjustment Board for binding arbitration. (*Id.*)

The arbitration provision contained in the COEs differs from that contained in the collective bargaining agreement only in that it provides for the resolution of a specific type of grievance or claim (e.g., statutory sex or race discrimination claims) arising from an action or actions of the Company. Like the grievance and arbitration provisions contained in the collective bargaining agreement, which were negotiated by the parties, the COEs' arbitration provision governs rules or conditions of the pilots' employment with Northwest and is thus a mandatory subject of bargaining. *See also Brotherhood of R.R. Trainmen*, 385 F.2d 601 (discussing the broad scope of bargainability).

Since the arbitration provision impacts the rates, rules, or working conditions of Northwest pilots, it does not automatically fall outside the scope of mandatory bargaining under the RLA.

D. Whether the Parties' Dispute Over Northwest's Use of the pre-1995 COEs[5] Is a "Major" or "Minor" One Under the RLA

If the Court determines that the matter before it constitutes a "major" dispute, then it has subject-matter jurisdiction to enjoin a violation of the status quo pending the parties' completion of the bargaining and mediation process. RLA §§ 2 Seventh and 6, 45 U.S.C. §§ 152 and 156; *see also Conrail*, 491 U.S. at 302-03. If the Court determines that the parties are involved in a "minor" dispute, the matter shall be resolved through conference[6] or compulsory arbitration, and the Adjustment Board has exclusive jurisdiction over the

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[5] The Court will discuss separately the COEs used by Northwest prior to 1995 that do not contain the arbitration provision, and those employed from 1995 to the present, which do contain that provision.

[6] See *supra* footnote 2.

dispute. RLA §§ 2 Sixth and 3, 45 U.S.C. §§152 and 153; *see also Conrail* 491 U.S. at 304.

The term "major dispute" refers to:

> disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. *They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.*

Conrail, 491 U.S. at 302 (quoting *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723 (1945) (emphasis added)).

The term "minor dispute":

> contemplates the existence of a collective agreement already concluded, or at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.

Conrail, 491 U.S. at 303 (quoting *Burley*, 325 U.S. at 723).

Northwest claims the right, based on the "unbroken understanding of three decades", to "promulgate, amend, and rely upon its Conditions of Employment." (Def.'s Mem. Summ. J. at 18.) Northwest argues that ALPA, by virtue of its three decades of silence, has acquiesced to its practice of requiring newly hired pilots to sign COEs. Northwest also claims that because its practice is so longstanding and, until now, uncontested by the union, that it has risen to the level of an implied contractual term. That implied contractual term, according to Northwest, grants it discretionary authority to require pilots to sign COE agreements as a precondition to employment and permits it to make unilateral changes in the terms of the COEs.

Northwest claims that it seeks no new rights for the future, but instead is asserting rights that have vested in the past. *See Burley*, 325 U.S. at 723. According to its formulation of the issue, the matter before the Court falls squarely within the "minor dispute" category.

ALPA responds that neither it nor its individual members knew about nor acquiesced to the use of the COEs. Absent the union's actual knowledge of the past practice, ALPA argues that the past practice in this case can give rise to no implied existing contractual agreement. Past practices rise to the level of an implied agreement only when, ALPA argues, they have "ripened into an established and recognized custom *between the parties*." *Brotherhood of Ry. Carmen v. Missouri Pacific R.R. Co.*, 944 F.2d 1422, 1429 (8th Cir. 1991) (citations omitted) (emphasis added).

ALPA states that a practice must be "understood by the parties to at least impliedly serve as if [it is] part of the collective bargaining agreement." *Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 863 F.2d 891, 897 (D.C. Cir. 1988) (citations omitted). ALPA argues that, in this case, there was no understanding between the parties. Since ALPA believes that Northwest has demonstrated neither notice to nor acceptance by the union of the COEs, it concludes that there can be no "past practice" in this case.

Carrying ALPA's argument to its logical conclusion, if there is no past practice upon which Northwest may lawfully rely, any rights claimed by the airline have not in fact vested in the past, but instead are claims to have new rights created. *See Burley*, 325 U.S. at 723. Under this formulation, the matter would fall within the category of "major dispute".

The Supreme Court in *Conrail* articulated the standard to be used by courts to differentiate between "major" and "minor" disputes. 491 U.S. at 310. The *Conrail* Court held that:

> [I]f an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board.

Conrail, 491 U.S. at 310.

In *Conrail*, the railroad had, for ten years, routinely required its employees to undergo physical examinations. The parties agreed that Conrail's authority to conduct physical examinations had ripened into an implied term of the parties' collective-bargaining agreement, which had been established by longstanding past practice and acquiesced to by the union. *Id.* at 312. The union contested, however, Conrail's unilateral expansion of that longstanding practice to include drug testing as extending beyond the scope of the implied terms of the collective bargaining agreement.

The Supreme Court held that the case constituted a minor dispute between Conrail and the union that fell within the exclusive jurisdiction of the Adjustment Board. The Court reasoned that, while the union's arguments could "conceivably carry the day . . . they do not convince us that Conrail's contractual arguments are frivolous or insubstantial." *Id.* at 317.

The Court must, in the matter before it, reach the same conclusion as that reached by the *Conrail* court. ALPA may ultimately demonstrate, after a full evidentiary hearing, that its 30-year silence did not constitute union consent to the COEs and that no implied contractual term could exist. It has not convinced the Court, however, that Northwest's contractual arguments are "frivolous or insubstantial".

Northwest's interpretation of the range of its discretion to include authority to "promulgate, amend, and rely upon its Conditions of Employment", is "arguably justified" by its 30-year practice of having done so.

The Court holds that the use of the pre-1995 COEs constitutes a "minor dispute" which falls within the exclusive jurisdiction of the Adjustment Board. The Court emphasizes, however, that it holds *only* that Northwest has "met the light burden of persuading this Court that its [] practice is arguably justified by the implied terms of its collective-bargaining agreement." *Conrail*, 491 U.S. at 320. The Court does "not seek to minimize any force in the Union's arguments", nor does the Court suggest that Northwest "is or is not entitled to prevail before the Board on the merits of the dispute." *Id.*

E. Whether the Parties' Dispute Over the post-1995 COEs[7] Is a "Major" or "Minor" One Under the RLA

In 1995, Northwest amended the COE to include the provision for arbitration of statutory and common law claims. Since then, Northwest has included the arbitration provision in approximately 1,050 COEs with newly-hired pilots, and there is no indication that the airline intends to remove the provision from future COE agreements. In 1997, ALPA contested the airline's authority to require both the arbitration provisions and the COE agreements in general.

Northwest cannot, and indeed does not, argue that ALPA has acquiesced to the airline's use of the arbitration provision. Unlike its use of the pre-1995 COEs, the airline does not claim that the 1995 arbitration requirement is an implied contractual term of the collective bargaining agreement between Northwest and the union.

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[7] The Court will refer to the COEs containing the arbitration provision as the "post-1995 COEs".

As discussed above, a "major dispute" under the RLA arises "where there is no such [collective bargaining] agreement or *where it is sought to change the terms of one*". *Conrail*, 491 U.S. at 302 (quoting *Burley*, 325 U.S. at 723 (emphasis added)). The terms of the collective bargaining agreement between the parties provide for the resolution of "grievance[s] concerning any action of the Company". (Plunkett Decl. Ex. 1, Collective Bargaining Agreement between ALPA and Northwest, at § 20.) Sections 20-21 of the collective bargaining agreement require appeals of airline decisions regarding those grievances to be submitted to the Adjustment Board for binding arbitration. (*Id.* at §§ 20-21.)

The collective bargaining agreement does not, however, explicitly provide for the mandatory arbitration of individual statutory or common law claims. Northwest's inclusion of the arbitration provision thus seeks to change the terms of the existing collective bargaining agreement and, by doing so, to create new rights.

Therefore, the Court finds that the parties' dispute over Northwest's use of the COEs containing the arbitration provision constitutes a major dispute for purposes of the RLA and is thus governed by RLA §§ 2 Seventh and 6, 45 U.S.C. §§ 152 and 156.

In the case of major disputes, the employer may not implement the contested change until the parties have completed the statutorily mandated bargaining and mediation process. RLA §§ 2 Seventh and 6, 45 U.S.C. §§ 152 and 156; *Conrail*, 491 U.S. at 302-03. For that reason, the Court will enjoin Northwest from implementing existing COEs that contain the arbitration provisions, or requiring new pilots to sign COEs containing that provision, pending completion of the bargaining and mediation process. *Conrail*, 491 U.S. at 302-03 (citing *Detroit & T.S.L.R.*, 396 U.S. at 142).

IV. Conclusion

For the reasons discussed above, it is hereby

ORDERED, that Defendant's Motion for Summary Judgment [#7] is granted in part and denied in part, and Plaintiff's Motion for Summary Judgment [#8] is granted in part and denied in part, as follows:

The Court concludes that the labor dispute concerning Northwest's longstanding practice of requiring COEs as a precondition of employment constitutes a "minor dispute" as that term is used pursuant to the RLA. As such, the Northwest Airlines Pilots' System Board of Adjustment (the Adjustment Board agreed to by the parties pursuant to RLA § 3 Second, 45 U.S.C. § 153) has exclusive jurisdiction over that dispute. This holding affects only the pre-1995 COEs, i.e., those executed prior to Northwest's adoption of the arbitration provision.

The Court further concludes that the labor dispute concerning Northwest's use of the post-1995 COEs (those containing the arbitration provision) constitutes a "major dispute". Consequently, Northwest Airlines is enjoined from implementing COEs containing the arbitration provision and from requiring from newly-hired pilots COEs containing the provision pending completion of the bargaining and mediation process required by RLA §§ 5 and 6, 45 U.S.C. §§ 155 and 156. All issues having been decided, this case is now closed. An Order will issue with this Opinion.

Date: Sept. 23, 1998

/s/ Gladys Kessler
GLADYS KESSLER
United States District Judge

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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Sept. 23, 1998]

Civil Action
No. 97-1917 (GK)

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff,

v.

NORTHWEST AIRLINES, INC.
Defendant.

ORDER

The Air Line Pilots Association, International ("ALPA" or "the union") brings suit against Northwest Airlines, Inc. ("Northwest") under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, to prevent Northwest from entering into or maintaining individual contracts of employment with newly-hired pilots. ALPA claims that such contracts violate the RLA.

This matter is now before the Court on the parties' cross-Motions for Summary Judgment [#7, #8]. Upon consideration of the Motions, Oppositions, Replies, and the entire record herein, for the reasons discussed below, Defendant's Motion for Summary Judgment [#7] is granted in part and denied in part, and Plaintiff's Motion for Summary Judgment [#8] is granted in part and denied in part, as follows:

The Court finds that the labor dispute concerning Northwest's longstanding practice of requiring COEs as a precondition of employment constitutes a "minor dispute" as that term is used pursuant to the RLA. As such, the Northwest Airlines Pilots' System Board of Adjustment (the Adjustment Board agreed to by the parties pursuant to RLA § 3 Second, 45 U.S.C. § 153) has exclusive jurisdiction over that dispute. This holding affects only the pre-1995 COEs, i.e., those executed prior to Northwest's adoption of the arbitration provision.

The Court further concludes that the labor dispute concerning Northwest's use of the post-1995 COEs (those containing the arbitration provision) constitutes a "major dispute". Consequently, Northwest Airlines is enjoined from implementing COEs containing the arbitration provision and from requiring from newly-hired pilots COEs containing the arbitration provision pending completion of the bargaining and mediation process required by RLA §§ 5 and 6, 45 U.S.C. §§ 155 and 156.

Date: Sept. 23, 1998

/s/ Gladys Kessler.
GLADYS KESSLER.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Oct. 07, 1998]

Civil Action No. 97-1917 (GK)

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff,

v.

NORTHWEST AIRLINES, INC.,
Defendant.

ORDER

Upon consideration of the Unopposed Motion of Defendant Northwest Airlines for Amendment of Order, and the entire record herein,

It is hereby ORDERED that the Court's Order dated September 23, 1998, is amended by inserting, at the end of the final sentence:

> "except that Northwest may require new pilot trainees to execute Conditions of Employment, including arbitration provisions. All of the provisions of those Conditions of Employment documents will be enforceable as to the employment of pilot trainees until the pilot trainee enters active service at Northwest."

IT IS SO ORDERED

Date: Oct. 2, 1998

/s/ Gladys Kessler.
GLADYS KESSLER.
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Mar 9, 2000]
97cv01917

No. 98-7196

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Appellee

v.

NORTHWEST AIRLINES, INC.,
Appellant

Consolidated with 98-7202

BEFORE: EDWARDS, *Chief Judge*; SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*

ORDER

Upon consideration of the petition for rehearing en banc of appellee/cross-appellant, the response thereto, and the vote by a majority of the judges of the court in regular active service in favor of the petition, it is

ORDERED that the petition be granted. These cases will be reheard by the court sitting en banc on Wednesday, May 10, 2000 at 10 A.M. The judgment filed herein on December 28, 1999 is hereby vacated. It is

FURTHER ORDERED that an order governing further proceedings shall issue separately.

Per Curiam

FOR THE COURT:

/s/ Mark J. Langer,
MARK J. LANGER,
Clerk

BY: Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed May 19, 2000]

Nos. 98-7196 and 98-7202

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
Appellee/Cross-Appellant

v.

NORTHWEST AIRLINES, INC.
Appellant/Cross-Appellee

Appeals from the United States District Court
for the District of Columbia
(No. 97cv01917)

BEFORE: EDWARDS, *Chief Judge*, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, *Circuit Judges*.

JUDGMENT

These appeals were considered *en banc* on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the judgment and opinion of the court announced by the panel in these cases, 199 F.3d 477 (D.C. Cir. 1999), are reinstated as the judgment and opinion of the court sitting *en banc*.

Per curiam

FOR THE COURT:

/s/ Mark J. Langer,
MARK J. LANGER, CLERK

By: Eva Brown
Deputy Clerk

APPENDIX G

PERTINENT PROVISIONS OF THE
RAILWAY LABOR ACT

45 U.S.C. § 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefore, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Sixth. Conference of representatives; times; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * *

45 U.S.C. § 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties

interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

(2)

No. 00-260

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

NORTHWEST AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under the Railway Labor Act, arbitration of statutory claims is a mandatory subject of collective bargaining — *i.e.*, one about which the employer and union are compelled by law to negotiate.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Northwest Airlines, Inc., is a wholly-owned subsidiary of Northwest Airlines Corporation, a publicly traded company. As of December 31, 1999, based on a Schedule 13G filed with the Security and Exchange Commission, AXA Financial, Inc. (formerly known as the Equitable Companies Incorporated), through subsidiaries and affiliates, had a beneficial ownership of more than 10% of the stock of Northwest Airline Corporation.

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Northwest Airlines, Inc., respectfully submits this brief in opposition to the petition for certiorari in this case.

STATEMENT OF THE CASE

The petition filed by the Air Line Pilots Association (ALPA) mischaracterizes the proceedings below in two material respects:

1. As explained in greater detail in the Argument section below, ALPA has distorted beyond recognition the question presented — and the position ALPA has taken previously in this litigation — in order to lend some credence to the asserted basis for its petition. ALPA now claims that the question presented is ALPA's "authority to enter into a binding arbitration agreement," *i.e.*, to bind its members by agreeing in collective bargaining that statutory discrimination claims must be submitted to arbitration. Pet. 8. In the courts below, ALPA insisted that "the fundamental issue *is not* whether a union can waive an individual's rights under Title VII with or without his consent. . . ." Brief for Appellee/ Cross-Appellant at 27 (emphasis added). Rather, ALPA presented the question purely as a labor law question on the scope of mandatory collective bargaining. ALPA argued that the court of appeals should "*preclude* the union from imposing compulsory arbitration through collective bargaining agreement[s], but nevertheless require collective bargaining with respect to whether the employer will be permitted to obtain individual arbitration agreements from employees, and if so, what the terms of those agreements will be." Pet. for rehearing *en banc* at 4 (emphasis added).

The reason for ALPA's facile detour is obvious; the question actually answered by the court of appeals is plainly not cert-worthy. It was decided *en banc* without dissent, and is a question of first impression in *any* court. While there is at least some semblance of a circuit split on the question ALPA now champions, the two questions are quite different. The lower courts were never asked to pass upon the question ALPA now claims to be presented here. For this reason alone, certiorari should be denied.

2. ALPA claims that Northwest's argument below rested entirely on the ongoing validity of this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for the proposition that arbitration of statutory claims is an impermissible subject of collective bargaining. Pet. 3. That describes Northwest's argument inaccurately. Although Northwest did rely on *Alexander* in part, it also argued that arbitration of statutory claims is not within the scope of the statutory phrase "rates of pay, rules, and working conditions" — the scope of mandatory bargaining — even apart from *Alexander*. In other words, even if *Alexander* were reversed on the question whether arbitration is an impermissible subject of bargaining, it is another, entirely separate, issue whether arbitration is then merely a permissible subject of bargaining, or a mandatory subject.

SUMMARY OF ARGUMENT

ALPA attempts to contrive a colorable argument for certiorari in this case by gerrymandering the issue presented. ALPA claims repeatedly that the question posed is whether a union "has authority" to enter into an agreement binding its members to arbitrate their individual statutory claims. Pet. 6, 8, 9, 10. This question is not cert-worthy. It has been answered definitively by this Court, and the lower court authority is all but one-sided.

But that was not the question presented to the court of appeals, nor is that question presented here. The real question at issue is not the scope of the union's "permissive" bargaining authority — *i.e.*, would an agreement reached by the union and the employer be enforceable against individual union members — but whether a topic of bargaining can be mandatory for the employer when the union has no authority to conclude an agreement that is final and binding on each of its members. The court of appeals held that the answer must be no. "[T]he essence of collective bargaining is a notion of mutuality"; with respect to mandatory subjects of bargaining, "each side [must have] at least the authority both to offer and to concede." Pet. App. 14a, *quoting Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R.*, 385 F.2d 581, 603 (D.C. Cir. 1967). Although this labor law principle on which the court of appeals based its decision is well-settled, the precise question the court answered was one of first impression, and therefore it is not appropriate for review on certiorari.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED BY PETITIONER WAS NEVER CONSIDERED BY THE COURTS BELOW

As explained in the Statement, ALPA's position in this case has undergone a remarkable transformation. Until arriving in this Court, ALPA had steadfastly insisted that the question presented by this case "*is not* whether a union can waive an individual's rights under Title VII with or without his consent. . . ." Brief for Appellee/Cross-Appellant at 27 (emphasis added). Rather, until now, ALPA has argued that the law should "*preclude* the union from imposing

compulsory arbitration through collective bargaining agreement[s], but nevertheless require collective bargaining with respect to whether the employer will be permitted to obtain individual arbitration agreements from employees, and if so, what the terms of those agreements will be." Pet. for rehearing *en banc* at 4 (emphasis added).

Now, ALPA is convinced that the issue it studiously avoided in the lower courts is precisely the one this Court must address: "whether a union has authority . . . to enter into an agreement that requires the represented employees to submit to binding arbitration any claims arising under federal anti-discrimination statutes." Pet. 6. ALPA's threshold problem, however, is that this new issue — the scope of the union's *permissive* bargaining authority — was never presented to the lower courts for consideration. As ALPA's Complaint had requested, the district court held that the subject was a mandatory one — at least for the employer — and the court of appeals rejected that view. The court never was asked to pass upon the scope of the union's permissive authority.

This Court has frequently, and repeatedly, warned that it is not inclined to serve as an incubator for whatever new legal theories a party might devise after losing in the lower courts. This Court "do[es] not decide in the first instance issues not decided below." *NCAA v. Smith*, 526 U.S. 459, 469 (1999), *citing Roberts v. Galen of Va., Inc.*, 525 U.S. 253-54 (1999) and *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998); *see also Taylor v. Freedland & Koontz*, 503 U.S. 638 (1992) (court will not consider argument raised for first time in brief if not raised below).

In this case, the question ALPA asked this Court to decide: (a) was not decided below; (b) was not presented below; indeed (c) was explicitly, unambiguously, and

repeatedly *disclaimed* by ALPA below. While certiorari would not be warranted (as explained below) on *either* the question *actually* presented *or* the question ALPA now sponsors, even if the Court were inclined to review one of those questions, this case would not provide an appropriate vehicle to do so.

II. THERE IS NO REASON TO REVIEW THE QUESTION ACTUALLY RESOLVED BY THE COURT OF APPEALS

None of the ordinary bases for certiorari is present in this case. As explained in subsection A below, the court of appeals' decision does not conflict with any decision of this Court. Similarly, the decision below neither creates nor exacerbates any division of authority on the question, because it is a question of first impression. As explained in Section B, the decision below was entirely correct; the court of appeals sensibly applied settled law about the duty to bargain to unremarkable and uncontested facts.

A. The Question Addressed Below Is One Of First Impression

ALPA suggests indirectly that the decision below is at odds with at least one decision of this Court, and argues that "the courts of appeals are . . . divided" on the question ALPA now claims to present. Pet. 6. Neither claim is accurate.

First, ALPA claims that the Court should use this case to resolve the "tension" between *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991). Pet. 6-7, *quoting Wright v. Universal Maritime Service Corp.*,

525 U.S. 70, 75-76 (1998). While the two cases reflect different attitudes about the efficacy of arbitration for the resolving statutory claims, neither case arose under federal labor law, and whatever tension exists between the cases is entirely irrelevant to the question presented here.

Indeed, with respect to the question at issue here, the cases are entirely consistent. The *Alexander* Court concluded that the rights conferred by federal anti-discrimination law are individual, not collective. While a union has broad authority over collective rights, the Court concluded, a union has no role whatsoever in the disposition of individual statutory rights. Thus, the Court held, the individual rights created by federal statute "can form no part of the collective bargaining process." *Id.* at 51 (emphasis added).[1] In *Gilmer*, the Court held that an individual could enter into a pre-dispute agreement to arbitrate claims arising from federal discrimination law.

These holdings are entirely consistent with each other and with the decision below. The court of appeals in this case held that while an *individual* might agree to arbitrate any statutory discrimination claim she might come to possess (following *Gilmer*), the employer is not required to bargain with the union representing that individual before broaching the subject of arbitration with its employees (following *Alexander*). Even if there is some residual tension between other aspects of *Gilmer* and *Alexander*, that tension has no consequence at all in this case.

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1. The Court has subsequently confirmed this distinction in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 734 (1981); *McDonald v. West Branch*, 466 U.S. 284, 291 (1984); and *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994).

Second, ALPA incorrectly suggests that there is a division of authority among the courts of appeals exists warranting action by this Court. ALPA cites only to cases in which an employer has attempted to enforce an existing arbitration agreement voluntarily bargained by the employer and the union. Pet. 6-7. Those cases did not concern whether labor law *requires* collective bargaining over the arbitration of statutory claims, but the entirely different question whether an arbitration agreement, once reached, would be enforceable against the union's members under the anti-discrimination laws.[2] No such agreement exists in this case.

B. The Court Of Appeals Resolved This Case Correctly

ALPA's Complaint below raised only one claim — an alleged violation of the duty to bargain under the Railway Labor Act. ALPA insisted below, and the district court held, that the arbitration of statutory claims is a mandatory subject

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2. In labor law parlance, the possible subjects for collective bargaining are divided into three categories: mandatory, permissive, and impermissible or unlawful. Parties are obligated to bargain in good faith on demand over topics in the first category, are permitted to, but are not required to, bargain over topics in the second category, and are prohibited from bargaining over topics in the third category. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Although the *Borg-Warner* case construed the meaning of the NLRA's command to bargain over "rates of pay, wages, hours of employment, [and] other conditions of employment," courts commonly apply the same mandatory-permissive distinction in construing the RLA's similar mandate to bargain over "rates of pay, rules, [and] working conditions." *Id.* at 344. *See, e.g., Japan Air Lines, Inc. v. IAM*, 538 F.2d 46 (2d Cir. 1976); *ALPA v. United Airlines, Inc.*, 802 F.2d 886, 902 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

of bargaining for the employer. The district court also found, however, that arbitration agreements were not a mandatory subject for the union, but instead were a unique subject of bargaining, one on which the union had the power to obstruct employer action, but no authority to conclude an enforceable agreement.

This conclusion was premised on a fundamental misunderstanding of the nature of a mandatory topic of collective bargaining. The defining characteristic of the "mandatory subject" label is the union's role as the *exclusive* bargaining representative of the employees on that subject. When employees select union representation, they are "deprived by [federal labor law, here the Railway Labor Act] of the right, which they would otherwise possess, to . . . bargain individually on behalf of themselves as to the matters which are properly the subject of collective bargaining." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 200 (1944). On mandatory topics of bargaining, an employer has a statutory obligation to bargain with the union representing its employees — and only that union. 45 U.S.C. § 152, Ninth; *see also Virginia Ry. v. System Fed'n No. 40*, 300 U.S. 515 (1937); *BMWE v. Grand Trunk Western R.R.*, 961 F.2d 1245 (6th Cir. 1992); *Skyways, Inc. v. NMB*, 738 F.2d 339, 342 (8th Cir. 1984). The district court effectively created a new category of bargaining subjects, a category where the employer is obligated to bargain, but the union has no authority to reach a final and binding agreement. As this Court has explained, and as the court of appeals recognized, this cannot be:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely

> chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees*. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . . *Thus only the union may contract the employee's terms and conditions of employment*. . . .

(Footnotes omitted). *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (emphasis added).

Thus, on the question actually presented and decided below, the court of appeals simply applied settled labor law. No contrary law exists, and no useful purpose would be served by granting review in this case.

III. THE QUESTION POSED BY PETITIONERS HAS ALREADY BEEN RESOLVED BY THIS COURT, AND THERE IS NO APPRECIABLE DIVISION OF AUTHORITY ON THAT QUESTION

As previously explained, the question ALPA poses in its petition was never answered below. But even if this question were properly presented in this case, review would still not be warranted.

First, the question has been answered authoritatively, and repeatedly by this Court. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court held that the arbitration of claims arising under a collective bargaining agreement did not foreclose litigation of related issues under Title VII of the Civil Rights Act of 1964. The plaintiff in *Alexander* was a union member who first challenged his termination by means of a grievance under the non-discrimination clause of a collective bargaining agreement. He lost. He then filed a discrimination claim under Title VII in federal court. The district court dismissed the claim, finding that the lawsuit was barred by the adverse arbitration decision, but this Court ultimately reversed. The Court explained that a union

> may waive certain statutory rights related to *collective* activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members.

Id. at 51 (emphasis added). The union's bargaining authority, however, extends only to *collective* rights; individual rights, like those granted by Title VII, cannot be part of the collective bargaining process:

> Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. . . .

Id. at 51.

The Court explained that the personal quality of individual rights makes them unacceptable as topics for collective bargaining: "in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.* at 58. On topics within the scope of its authority, a union is permitted to compromise the interests of individuals, as well as those of sub-groups within the unit, to achieve the best bargain possible for the unit as a whole.[3] *Alexander* thus rests on the conclusion that the process of collective accommodation is antithetical to the notion of individual rights. The decision whether to arbitrate statutory and wrongful discharge claims is an individual one; for this reason, it "*can form no part of the collective bargaining process*." *Id.* at 51 (emphasis added).

This fundamental distinction between collective rights — which the union has authority to waive — and individual rights — over which the union has *no* authority — has been reaffirmed at least three times by this Court since *Alexander*.[4]

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3. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991); *see also Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

4. This Court has applied the distinction between collective and individual rights equally under the Railway Labor Act and the National Labor Relations Act. In *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994), the employer argued that a wrongful discharge claim brought under a Hawaii statute was subject to mandatory arbitration under the Railway Labor Act, which requires arbitration of any dispute which "grow[s] out of grievances or out of the interpretation and application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153, First

(Cont'd)

In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 734 (1981), the Court found that a union had no authority to bargain about the arbitration of an individual's federal wage claim under the Fair Labor Standards Act, 29 U.S.C. § 210 *et seq.*: "the rights petitioners seek to assert in this action are independent of the collective bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization." *Id.* at 745. The Court explained that collective and individual statutory rights stem from "[t]wo [fundamentally different] aspects of national labor policy":

> The first [aspect], reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights.

Id. at 734.

(Cont'd)

(i). Grounding its decision on the distinction between rights arising from the collective agreement and those arising from statute or common law, the Court held that because the collective bargaining agreement was not the source of the rights asserted, the wrongful discharge claim was not subject to mandatory arbitration. *Accord Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988) (National Labor Relations Act; employee not required to arbitrate under collective bargaining agreement state law cause of action); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

In *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984), the Court again relied on this fundamental distinction in holding that a claim under 42 U.S.C. § 1983 was not barred by the outcome of an arbitration under a collective bargaining agreement. A union, the Court held, cannot control the litigation of an individual's statutory claims because "[t]he union's interests and those of the employee are not always identical or even compatible." More recently, in *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (1994), the Court again referred to the "distinctly separate nature of . . . contractual and statutory rights" and warned that in the collective bargaining process, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."

The lower courts have had no problem harmonizing these cases with the holding in *Gilmer* — the source of the "tension" relied upon by ALPA. The rule resulting from these cases is that "an individual [may] waive his prerogative to pursue a statutory right in a judicial forum, [but] a labor union cannot make such a waiver prospectively on an individual's behalf." *Penny v. United Parcel Service*, 128 F.3d 408, 413 (6th Cir. 1997); *accord Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362-63 (7th Cir.), *cert. denied*, 118 S. Ct. 295 (1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (arbitration provision in collective bargaining agreement does not bar federal court litigation of Title VII claim); *Albertson's, Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758 (9th Cir. 1998) (arbitration provision in collective bargaining agreement does not bar federal court litigation of FLSA claims), *petition for cert. filed*, 67 U.S.L.W. 3505 (U.S. Feb. 4, 1999) (No. 98-1270); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir. 1997) ("statutory employment claims are

independent of a collective bargaining agreement's grievance and arbitration procedures"), *vacated on other grounds*, 118 S. Ct. 2364 (1998), *reaffirmed in relevant part*, 158 F.3d 1371 (10th Cir. 1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) ("a mandatory arbitration clause does not bar litigation of a federal statutory claim unless . . . the *employee* [has] agreed *individually* to the contract containing the arbitration clause — *the union having agreed for the employee during collective bargaining does not count*") (emphasis added).

Only the Fourth Circuit has even suggested a contrary view, and it did so while recognizing that its decision was inconsistent with *Alexander*. *See Austin v. Owens-Brockway Glass Container*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996). In *Austin*, the Fourth Circuit correctly gleaned from *Gilmer* (and a number of other decisions of this Court)[5] the conclusion that *Alexander*'s disdain for the arbitration process had become outmoded. Without further analysis, however, the Fourth Circuit then concluded, incorrectly, that a union and an employer might deal collectively with the statutory rights of the union's members by obligating those members to arbitrate their statutory claims.

The Fourth Circuit's decision relates at most to whether arbitration of statutory claims should be moved from the list of impermissible topics to the list of permissible ones. It did not discuss at all the question whether the topic is a mandatory one. While the Fourth Circuit correctly observed

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5. *E.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

that since *Alexander*, Congress and the courts had accepted arbitration as an appropriate mechanism for resolving statutory claims, it did not address at all the fundamental issues of labor law presented here. As the *Gilmer* Court held — and as experience has shown — individuals are capable of determining the manner in which their statutory claims are to be resolved. There is no reason to insinuate those individual rights into the collective bargaining arena.

IV. THERE IS NO QUESTION OF NATIONAL IMPORTANCE PRESENTED IN THIS CASE

To ALPA, this case raises "an important question of labor law," but it is apparent that ALPA views the case as important only because ALPA objects to arbitration as a mechanism for resolving statutory claims. ALPA has been careful to avoid specifying its concerns, perhaps because this Court has refuted — effectively and directly — the alleged deficiencies of arbitration in a series of prior decisions.[6] *See Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Nonetheless, it is apparent that ALPA's antipathy for arbitration — and therefore its claim that this case raises issues of national importance — stems from the conviction that it must "protect" its members from a dispute resolution process in which ALPA believes individuals fare poorly, at least when that system is compared to federal court litigation. That contention is demonstrably incorrect.

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6. There was no allegation in ALPA's Complaint, and no argument made below, that the arbitration process utilized by Northwest was in any way one-sided or unfair.

1. In employment discrimination cases, grievants in arbitration win *far more often* than do their counterparts in the federal courts. In employment cases administered by the American Arbitration Association in 1992, *employees won 73% of the claims they filed.* L.J. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 45-46 (1998), *citing* L.B. Bingham, *Is There A Bias In Arbitration Of Nonunion Employment Disputes? An Analysis Of Actual Cases and Outcomes*, 5 Int'l J. of Conflict Mgmt. 369, 378 (1995). By comparison, less than 6% of the employment cases filed in federal district court even get to trial.[7] For the 94% of federal cases that never get to trial, the alleged advantages of the jury system are mere illusion.

2. Even for the few federal court employment discrimination litigants who do get to trial, the cost of attaining that goal may be all out of proportion to the achievement. The median time from complaint to trial is 19 months.[8] Ten percent of the cases actually tried have waited for well over three years to reach that point. *Id.* During these years of pretrial machinations in district court, the parties and their lawyers often spend large sums of money — often sums much greater than the pure economic value of the underlying case could possibly justify.

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7. *See Judicial Business of the United States Courts*, Administrative Office of the United States Courts (hereafter "Report"), Supplemental Table C-4. The entire report, and all of the associated tables, are available at www.uscourts.gov/judbus1999/index.html.

8. Report, Table C-5. In some districts, the *average* wait is nearly three years. *Id.*

Although reliable empirical data on the litigation costs in employment cases are difficult to come by, courts routinely approve fee petitions for hundreds of thousands of dollars in fees in routine single-plaintiff discrimination cases. *See, e.g., Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997) ($430,752 fee award in single plaintiff Title VII case where plaintiff recovered $300,000), *cert. denied*, 525 U.S. 822 (1998); *Bevan v. Honeywell, Inc.*, 118 F.3d 603 (8th Cir. 1997) (awarding fee of $250,000 — reduced from the claimed $440,000 — in single plaintiff ADEA case where plaintiff obtained back pay award of $275,000); *Moore v. University of Notre Dame*, 22 F. Supp. 896 (S.D. Ind. 1998) (same; $394,865 fee award under ADEA in case where plaintiff recovered $161,000); *Perdue v. City University of New York*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998) (same; $339,339 fee award; $443,000 recovery); *Martini v. Federal Nat'l Mortgage Ass'n*, 977 F. Supp. 482 (D.D.C. 1997) (approving more than $230,000 in trial-court-only fees), *rev'd on other grounds*, 178 F.3d 1336 (1999), *cert. dismissed*, 120 S. Ct. 1155 (2000). As these figures demonstrate, despite the best efforts of courts and counsel, the promise of Rule 1 of the Federal Rules of Civil Procedure — "the just, speedy, and inexpensive determination of every action" — is often painfully elusive. These undeniable facts, however, have not significantly reduced the crush of employment law litigation facing the federal courts. Employment discrimination cases represented 14% of the federal district court case load. Report, Table C-2A.

3. Litigants pay other prices for these delays and expenses of litigation, especially where those claims involve incumbent employees. In a typical failure-to-promote case, for example, unavoidable human emotions will complicate the working relationships between decisionmaker, successful

candidate, and disappointed applicant while the litigation wends its way through the system; animosities among the personalities involved in the dispute fester, the underlying employment decisions are effected under a cloud of uncertainty, and productivity suffers. These circumstances, which are often unavoidable in the kinds of highly personal disputes at issue in most employment cases, give all parties to the dispute a significant interest in a prompt and binding resolution of the matter.

For these reasons, the arbitration of discrimination claims is entirely consistent with the goals and objectives of federal law. Thus, there is no basis for the apocalyptic tone of ALPA's petition. When an individual processes a discrimination claim through arbitration, he merely "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 00-260

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IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Air Line Pilots Association wishes to reply briefly to Respondent's argument that the first issue presented in the petition for certiorari was not raised or decided below. We believe the other matters discussed in Respondent's brief in opposition have been adequately addressed in the petition and require no further comment here.

The issues that were presented to and considered by the court of appeals were succinctly described in the court's opinion as follows:

> Is the arbitration of statutory discrimination claims a mandatory subject of bargaining? Northwest says not . . . , reasoning as follows. Under *Alexander v. Gardner-Denver Co.*, [citation omitted], a union cannot waive the right of the employees it represents to bring a statutory discrimination claim in a judicial forum. Because ALPA

> cannot agree to such a provision, it cannot be a mandatory subject of collective bargaining. . . .
>
> For its part, ALPA urges that the arbitration of statutory claims is a mandatory subject, . . . for three independent but related reasons. **First, *Gilmer v. Interstate/Johnson Lane Corp.*, [citation omitted] "effectively supersedes" *Gardner-Denver*. If, as ALPA reads *Gilmer*, a union may in collective bargaining waive the employees' right to a judicial forum for a statutory discrimination claim, then there is no reason to doubt that the arbitration of statutory claims is a mandatory subject of bargaining.** Second, even if *Gardner-Denver* is still good law, it has no effect upon whether arbitration of statutory claims is a mandatory subject of bargaining. In other words, as the district court held, Northwest must bargain with ALPA over the Arbitration Clause regardless whether ALPA could lawfully agree to it because it is directly related to "rates of pay, rules, or working conditions." Third, even if waiver of the right to a judicial forum is not a mandatory subject of bargaining because ALPA cannot agree to such a waiver under *Gardner-Denver*, the procedural rules for arbitration, as specified in the Arbitration Clause, are mandatory subjects of bargaining.

(Pet. App. 7a-8a, emphasis added).

The portion of the above excerpt that we have highlighted makes clear that the first issue raised in the petition for certiorari was presented to and considered by the court of appeals. Moreover, later in its opinion the court devoted several paragraphs to discussing that issue, ultimately concluding that *Gilmer* did not "supersede" *Gardner-Denver*, but rather that the two cases could be reconciled. (Pet. App. 12a-14a). The court saw "a clear rule of law emerging from *Gardner-Denver* and *Gilmer*: Unless the Congress has

precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him." (*Id.* at 13a). The issue raised by the first question presented in the petition for certiorari is simply whether this conclusion of the court of appeals is correct, or whether, if "an individual may prospectively waive his own statutory right to a judicial forum," a union may also do so through collective bargaining on behalf of the employees it represents.

To be sure, ALPA also argued that even if *Gardner-Denver* precludes a union from entering into an agreement that requires employees to submit statutory discrimination claims to arbitration, an employer must nevertheless bargain with a union before requesting or requiring individual union-represented employees to sign such an agreement as a condition of their employment. This is the second issue raised in the petition for certiorari. Respondent, relying on selected quotations from ALPA's brief and petition for rehearing in the court of appeals, now claims that this second issue was the only issue raised below. But as the court of appeals' opinion makes clear, both issues were argued and both were decided.

Respectfully submitted,

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